No. 12568

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

WARNER BROS. PICTURES, INC., COLUMBIA PICTURES CORPORATION and LOEW'S INCORPORATED,

Respondents.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF OF RESPONDENTS WARNER BROS. PICTURES, INC., COLUMBIA PICTURES CORPORATION AND LOEW'S INCORPORATED.

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Statement of the Case.

The National Labor Relations Board has petitioned for enforcement of an order requiring respondents to take affirmative action with respect to reinstatement or payment of back pay to certain former employees who were members of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (hereinafter called the "IATSE"). The issues involve the application of the National Labor Relations Act (hereinafter sometimes referred to as the "Act") to uncontradicted evidence. There is no conflict of *evidence* with respect to the facts

which are material to this Court's decision in this proceeding. However, as to certain facts which are material to the Board's decision the Board has gone outside the evidence and made findings which are not supported by evidence as required by the Act.[1] The Board has also failed to make findings with respect to certain material facts which are supported by uncontradicted evidence.[2] An examination of the evidence which is material to this controversy and a proper application of the statute to those facts will disclose that the Board is not entitled to the enforcement of its order.

In order that the material facts may be considered in their proper chronology, a restatement and supplementing of the facts stated in the Board's Petition is required. The IATSE and the Conference of Studio Unions (hereinafter referred to as "CSU") were rival confederations of unions in the motion picture industry. Although both groups of unions were affiliated with the American Federation of Labor, they had for many years engaged in disputes with respect to which union should represent or have jurisdiction over employees doing various classifications of work in the motion picture industry (Pet. Br., 5). Each had sought to expand its power by claiming exclusive jurisdiction

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[1]The Board's finding that respondents agreed to abide by the Cincinnati Directive and that they agreed to reinstate complainants is not supported by any substantial evidence. The Board's finding that respondents did not discharge certain employees who the complaint alleges were discharged and that such employees were strikers is contrary to the uncontradicted evidence.

[2]The Board concedes that the CSU struck for the purpose of compelling respondents to recognize a CSU union as the collective bargaining representative of Interior Decorators (Pet. Br. 5), but it failed to find the undisputed fact, based upon official notice which it was requested to take of its own records, that at the time the CSU struck, the Board was conducting a hearing for the purpose of determining whether the CSU union or an IATSE union should be designated as the collective bargaining representative of Interior Decorators [R. 688-701; 61 NLRB 1030].

over first one type of work and then another, and the jealous ambitions of each of these powerful federation of unions to prevail over the other had, over a period of years, "resulted in long drawn out strikes called by one group or the other." (Pet. Br., 5.)

There was a group of employees in the motion picture industry variously known as Set Dressers, Set Decorators and Interior Decorators. These employees supervised and directed Property Men, who were a part of the stage crew represented by the IATSE, in the placement of so-called "props" upon sets or stages where motion pictures were photographed [R. 659]. On May 15, 1939, long before the events here in question, the IATSE had asserted its claim to jurisdiction over Set Dressers by issuing to its Local No. 44 a charter granting Local No. 44 jurisdiction over Set Dressers, along with Property Men, Prop Makers, and other classifications of employees [R. 776-7]. Prior to the events in question, Local 1421 of the Painters Union (which was a member of CSU) asserted its claim of jurisdiction over Set Dressers.[3]

The major motion picture producers, including respondents, finding themselves caught between the rival claims of a CSU union and an IATSE union over the right to represent or have jurisdiction over Set Dressers, under-

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[3]The Board was requested to take official notice of its own records which show that on December 6, 1944, Local 1421 of the Painters Union filed with the National Labor Relations Board a proceeding under the War Labor Disputes Act (57 Stat. 163) for the purpose of requiring the Board to take a strike vote among its members employed by the major motion picture producers upon the question of whether production in time of war should be interrupted on account of the claim of Local 1421 to jurisdiction over Set Decorators, otherwise known as Set Dressers and Interior Decorators; and that on January 6, 1945, the Board conducted elections in each of the major motion picture studios, including the studios of respondents, and in each case a majority of the employees entitled to vote voted in favor of a strike [R. 702-704].

took to provide for the orderly settlement of the dispute by the filing of an Employer's Representation Petition with the National Labor Relations Board on February 28, 1945, in which the CSU union and the IATSE union were named as rival claimants for the right to represent Set Dressers.[4] The stage was thus set for the Board to determine the appropriate unit in which Set Dressers should be included and whether the CSU union or the IATSE union should represent Set Dressers. On March 7, 1945, the hearing commenced before a Trial Examiner appointed by the Board, and was held from March 7 to 17, 1945, inclusive [R. 701; 61 NLRB 1030]. In this hearing the IATSE participated, of course to protect and establish its claim that the jurisdiction over these employees belonged to it and not to the CSU. In the midst of the hearing, on March 12, 1945, without awaiting the conclusion of the hearing and the decision by the Board, the CSU union called a strike against the major motion picture producers "because of the refusal of the motion picture producers, including respondents, to recognize its authority over the studio interior decorators, and was immediately joined by the other unions affiliated with the C.S.U." (Pet. Br., 5). The other CSU unions joined in the strike and participated in the picketing [R. 587, 334-335].

The IATSE recognized that although the strike was nominally against the major motion picture producers, it was actually against the IATSE, and that the strike had

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[4]The Board was requested to take official notice of its own records which showed that fact and also the fact that a representation petition previously filed by the CSU union involving other classifications of work was amended by the CSU union to include its claim over Set Dressers; that the IATSE union intervened in that proceeding; and that the proceeding filed by the CSU union and the proceeding filed by the motion picture producers were consolidated [R. 688-701; 61 NLRB 1030].

as its purpose the objective of compelling the major motion picture producers to reject the claim of the IATSE to jurisdiction over Set Dressers and to recognize the jurisdiction of the CSU union without waiting for the decision of the National Labor Relations Board. The IATSE believed that if the strike of the CSU were to be successful, the CSU, in a settlement of the strike, might be able to force the producers not only to recognize a CSU union as the collective bargaining agent of Set Dressers but also to recognize other CSU unions as the collective bargaining agents of employees in other disputed classifications of work performed by IATSE members, but claimed by other CSU unions, and that the result of a successful strike by the CSU might be the destruction of the influence and position of the IATSE in the motion picture industry [R. 657-9].

The IATSE immediately undertook concerted action to protect itself. As stated in petitioner's brief "IATSE pledged itself to assist the respondents to maintain production and directed its members not to honor the CSU picket lines." (Pet. Br., 5.) The President of the IATSE entered into an agreement with the producers that members of the IATSE would keep the studios running and would do whatever work the producers required [R. 223]. IATSE representatives made the offer on behalf of its members to do carpenter work and other work abandoned by the CSU strikers, and respondents accepted that offer [R. 86-90, 219-226, 240-241]. Petitioner in its brief states the agreement between the IATSE and respondents as follows:

> "IATSE also agreed to supply the producers with labor to maintain studio operations, and instructed its membership to perform whatever duties might be assigned regardless of whether such work had previously been performed by IATSE members or by employees presently on strike." (Pet. Br., 5.)

Of the more than 10,000 members of the IATSE who were working in the studios, there was only a small minority of about 100 who refused to join in the concerted activity undertaken by their union and to carry out the agreement made between their union and the major motion picture producers [R. 667, 538-539]. Complainants were among the 100 who refused to go along with their union's concerted activity and refused to carry out the agreement made for them by their collective bargaining agent.

When fourteen complainants at Warner Bros.[5] and two complainants at Columbia[6] refused to perform carpenter work or painting work as directed, they were told that they were discharged and were handed discharge slips [R. 634, 637, 211-12, 229, 242, 264, 281, 307, 320, 339, 362, 372, 425, 480, 485, 501, 549, 352-3, 441]. These employees understood that they were discharged [R. 211-12, 227, 229, 241, 345, 362, 372, 425, 501, 352-3]. Indeed, in the complaint it was the Board's theory that they were discharged [R. 714-15]; that was the theory of the Board's attorney [R. 218, 235, 425, 441]; and the Trial Examiner found that the fourteen Warner Bros. complainants were discharged [R. 147]. The Board's theory at the hearing before the Trial Examiner was that complainants were discharged because they had refused to do carpenter work or painting work, that such refusal was a concerted activity protected by the Act, and that their discharge was an interference with such concerted activity [R. 714-15]. The Trial Examiner made his findings in accordance with the Board's theory, calling the refusal to perform services a "partial strike" [R. 155], which he

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[5]Sapp, White, Stoica, Batchelder, Hand, Lora, Bonning, Gidlund, MacKellar, Rogers, DeSanctis, Lamb, Simpson and Jensen.

[6]Cuccia and Hentschel.

decided was a protected activity, apparently in reliance upon the Board's decision in *Montgomery Ward & Co.*, 64 NLRB 432, 435 [R. 155]. By the time the Board got around to rendering its decision, the Board's doctrine of "partial strike" had been blasted by decisions of the Courts of Appeals.[7] In its decision, which the Board here seeks to have enforced, the Board did an abrupt about-face and found that said complainants had not been discharged at all.

All of the evidence is contrary to that finding—the oral notification of discharge, the issuance of discharge slips, the understanding of the employees that they had been discharged, the removal of their names in due course from the payroll record, and in the case of those reemployed, their reemployment as new employees.

The fact that complainants discharged by Warner Bros. were offered the opportunity to return to work if they would perform services as directed in no way affects the fact that they were actually discharged. Complainants did not accept such offer and were removed from the payroll. In the case of those discharged employees who later sought reemployment, they were placed on the payroll as new employees.[8]

The uncontradicted evidence is that the employees named in footnotes (5) and (6) were discharged, and there is no evidence at all to support the Board's finding that they were not discharged.

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[7]*NLRB v. Montgomery Ward & Co.* (8th Cir.), 157 F. 2d 486, refusing enforcement of the Board's order reported in 64 NLRB 432; *C. G. Conn, Ltd. v. NLRB* (7th Cir.), 108 F. 2d 390, 397; *Home Beneficial Life Insurance Co. v. NLRB* (4th Cir.), 159 F. 2d 280; cert. denied 332 U. S. 758.

[8]Among the employees discharged by Warner Bros. were Pattern Makers Schnell, Horner and DeSanctis. Schnell and Horner were reemployed before the end of the strike and DeSanctis was reemployed after the strike ended. When reemployed, they were treated as new employees [R. 647-8, 771, 480-81, 615].

In addition to the complainants who were discharged, Warner Bros. told one complainant[9] who refused to perform carpenter work as directed to "go home" and no formal discharge slip was issued to him [R. 297]. Warner Bros. and Loew's Inc. each told a complainant[10] who refused to do carpenter work as directed to see his local union and no formal discharge slip was issued [R. 497, 393]. At Loew's one complainant[11] who refused to do painting work as directed, and at Warner Bros. one complainant[12] that refused to do carpenter work as directed left the studios and did not return during the period of the strike [R. 290, 383]. At Warner Bros. two complainants[13] failed to report for work at any time during the strike and one complainant[14] failed to report for work during the last few weeks of the strike [R. 449, 451, 466, 467, 468, 508, 509].

The studios continued in operation during the strike. The IATSE, in accordance with its agreement to maintain studio operations, furnished employees to take the place of the CSU strikers. With respect to the IATSE members who were discharged or left work, the IATSE, in accordance with its closed shop agreement [R. 748], furnished employees to replace them.

The next material event indicated by the evidence is that on October 25, 1945, the Executive Council Committee of

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[9]Larson.

[10]Seward and Selgrath.

[11]Groth.

[12]Goudie.

[13]Howe and Coffey.

[14]Stanley.

the American Federation of Labor, at its meeting in Cincinnati, issued a directive to the *unions* "That the Hollywood strike be terminated immediately" and "That all employees return to work immediately." The Directive further provided that if the International unions could not settle their claims to jurisdiction in Hollywood within thirty days, then a committee appointed by the Executive Council of the American Federation of Labor should make such determination within thirty days thereafter, and that the *unions* involved should accept the decision of the Executive Council Committee as final and binding.

The Board states in its brief, "Sometime in October the parties agreed to submit the dispute to the Executive Council of the American Federation of Labor which met at Cincinnati, Ohio, between October 15 and October 24." (Pet. Br. 6-7.) There is no evidence whatsoever that *respondents* agreed to submit the dispute to the Executive Council of the American Federation of Labor. The Board also states in its brief, "The Cincinnati agreement was accepted by respondents, the IATSE and CSU, and each of them agreed to be bound by its provisions." (Pet. Br. 7.) There is no evidence whatsoever that *respondents* agreed to abide by the directive or abide by the decision of the Executive Council Committee.

The CSU obeyed the Directive and called off the strike on October 31, 1945 and its strikers returned to work [R. 528, 671]. The dispute between the CSU returning strikers and the IATSE members who were performing strikers' jobs remained unsettled for sixty days pending the decision of the Executive Council Committee as to whether the CSU unions or the IATSE unions had jurisdiction over these jobs.

Complainants were not members of the CSU; they were members of the IATSE. When they were discharged or left work or failed to show up for work, respondents replaced them and on October 31, 1945 an employee furnished by the IATSE was working in every job which these discharged IATSE members had left with the exception of one Pattern Maker's job for which DeSanctis was reemployed [R. 615-628, 771-774]. There was no dispute between complainants, who were IATSE members, and the employees who had been furnished by the IATSE to replace complainants, as to which union had jurisdiction over their jobs. Complainants and the employees who replaced them being members of the same organization—the IATSE, there was nothing for the Executive Council Committee to decide as between them. No problem existed from a jurisdictional standpoint as to whether the work should be done by the one or the other.

At the conclusion of the strike complainants and other IATSE members who had failed to perform services during the strike as directed by their union and their employers, demanded that they be given the jobs then held by the persons supplied by the IATSE to do the work complainants had refused to perform. The respondents refused such demand. However, as vacancies occurred and there were jobs for which those members were qualified, many of them were employed or offered employment by respondents or other producers. [R. 311-312, 343, 377, 388, 411-412, 430, 474, 505.]

The Board found that "The Respondents, however, instead of rehiring these complainants, obliged them to obtain clearance from the Alliance [the IATSE] solely

because of their activities during the strike" [R. 12] and concluded that respondents "could not lawfully discriminate against complainants solely because of their activities during the strike" [R. 13].

Questions Presented.

1. Were complainants engaged in concerted activities protected by Section 7 of the National Labor Relations Act?

2. If complainants were not engaged in concerted activities protected by the Act, has the National Labor Relations Board power to require respondents to reinstate or pay back pay to complainants who were refused reinstatement because they engaged in such activities?

3. Could a purported agreement by respondents to reinstate complainants, transform into a concerted activity protected by the Act that which is not a concerted activity protected by the Act?

4. Is there reliable, probative, and substantial evidence that respondents agreed to reinstate complainants?

ARGUMENT.

I.

The Board Was Without Authority to Issue the Order Which It Seeks to Enforce, Because the Activities of Complainants Which It Found to Be the Cause of Respondents' Refusal to Reinstate Complainants Were Not Activities Protected by the Act. The Board's Power Is Limited to Remedying Interference With Rights Which Are Protected by the Act.

1. The Act Does Not Protect All Activities of Employees, and Employers Are Free to Discharge or Refuse Reinstatement to Employees Because They Engage in Activities Which Are Not Protected by the Act.

Section 7 of the Act which was in effect in 1945 provided, among other things, that employees should have the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection," and Section 8(1) of the Act provided that it was an unfair labor practice "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7." If the provisions of Section 7 were to be interpreted literally, every concerted activity undertaken by employees for their mutual aid or protection would be activity protected by the Act. It is well established that such literal interpretation of the Act is not permissible because it is plain that Congress never intended that every form of concerted activity by employees for their mutual aid or protection should be protected by the Act.

The most recent expression of the Supreme Court upon this subject is found in *International Union v.*

Wisconsin Employment Relations Board, 336 U. S. 245. There the employees of a company operating a manufacturing plant in Wisconsin, but which was engaged in interstate commerce, had engaged in the concerted activity of "calling repeated special meetings of the union during working hours, at any time the union saw fit, which the employees would leave work to attend." This was done without notice to the employer and without any assurance of when or whether the employees would return. The purpose of the union was to bring pressure on the employer to accede to union demands. The Wisconsin Employment Peace Act made such activities an unfair labor practice. The Wisconsin Supreme Court enforced an order of the state board enjoining such activities. The argument made to the United States Supreme Court was that such activities were protected by Section 7 of the National Labor Relations Act and that the state was without authority to enjoin such acts because the injunction was in conflict with the National Labor Relations Act. The Court held that such activities were not protected by the National Labor Relations Act. It said:

> "The bare language of Section 7 cannot be construed to immunize the conduct forbidden by the judgment below, and therefore the injunction as construed by the Wisconsin Supreme Court does not conflict with Section 7 of the Federal Act." (P. 257.)

After pointing to numerous decisions which hold that various types of concerted activity are not protected by the Act, the Court said:

> "That Congress has concurred in the view that neither §7 nor §13 confers absolute right to engage

in every kind of strike or other concerted activity does not rest upon mere inference; indeed the record indicates that, had the Courts not made these interpretations, the Congress would have gone as far or farther in the direction of limiting the right to engage in concerted activities including the right to strike." (P. 260.)

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"We think that this recurrent or intermittent unannounced stoppage of work to win unstated ends was neither forbidden by Federal statute nor was it recognized and approved thereby." (Pp. 264-5.)

There have been many examples of concerted activities of employees which the courts have held are not protected under the provisions of Section 7 of the Act. For example: *Southern Steamship Co. v. NLRB,* 316 U. S. 31 (strike during the voyage of a ship, which violated the statute prohibiting mutiny); *Allen-Bradley Local v. Wisconsin Employment Relations Board,* 315 U. S. 740, 750 (mass picketing, obstruction of factory entrance, threats, violence and picketing of employees' homes); *NLRB v. Sands Mfg. Co.,* 306 U. S. 332 (strike in violation of an agreement between a union and an employer); *NLRB v. Fansteel Corp.,* 306 U. S. 240 (sit-down strike); *NLRB v. Wytheville Knitting Mills* (3rd Cir.), 175 F. 2d 238 (hurling obnoxious and offensive epithets at non-strikers); *Joanna Cotton Mills Co. v. NLRB* (4th Cir.), 176 F. 2d 749 (circulating petition for removal of a foreman); *NLRB v. Reynolds International Pen Co.* (7th Cir.), 162 F. 2d 680 (walk-out of employees in protest against change of their foreman); *NLRB v. Perfect Circle Corp.* (7th Cir.), 162 F. 2d 566 (obstructing company manager from entering plant); *NLRB v. Scullin Steel Co.* (8th Cir.), 161 F. 2d 143 (refusal to perform services

as directed by the employer); *NLRB v. Kopman-Woracek Shoe Mfg. Co.* (8th Cir.), 158 F. 2d 103 (refusal to perform services as directed by the employer); *NLRB v. Montgomery Ward & Co.* (8th Cir.), 157 F. 2d 486 (refusal to perform strikers' work as directed by employer); *NLRB v. Indiana Desk Co.* (7th Cir.), 149 F. 2d 987 (strike to compel employer to violate the Wage Stabilization Act); *NLRB v. Draper Corp.* (4th Cir.), 145 F. 2d 199 (wildcat strike by a minority group which interfered with concerted activity of union); *United Biscuit Co. v. NLRB* (7th Cir.), 128 F. 2d 771 (refusal to perform strikers' work as directed by employer); *Hazel-Atlas Glass Co. v. NLRB* (4th Cir.), 127 F. 2d 109 (refusal of foreman to perform striker's work as directed by employer); *C. G. Conn, Ltd., v. NLRB* (7th Cir.), 108 F. 2d 390 (refusal of employees to work overtime as directed by employer).

In *Elk Lumber Co.,* 26 LRRM 1493, a decision of the National Labor Relations Board dated September 20, 1950, the Board recognized the principle that not all concerted activities for the mutual aid or protection of employees are protected by the Act, stating with respect to a slow-down:

> "Section 7 of the Act guarantees to employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection; however, both the Board and the Courts have recognized that not every form of activity that falls within the letter of this provision is protected."

In view of this well established principle of law, we now address ourselves to the question of whether complainants were engaged in concerted activities protected by Section 7 of the Act.

2. If Complainants Were Engaged in a Strike, It Was a "Wild Cat Strike"; i. e., a Strike by a Minority Group Which Interfered With the Concerted Activity Undertaken by the Group's Collective Bargaining Agent. A Wild Cat Strike Is Not a Concerted Activity Protected by the Act.

Notwithstanding the uncontradicted evidence that 16 complainants were discharged and that the remaining 7 complainants either left their work or failed to report for work without participating in the CSU strike, the Board nevertheless found that complainants "were strikers, engaged in concerted activities for their mutual aid or protection" [R. 10]. Assuming for the purpose of argument that complainants "were strikers," as found by the Board, they were engaged in a strike in defiance of the concerted activity undertaken by their union.[15] The concerted activity undertaken by the IATSE was the activity of not striking and, instead, of keeping the studios in operation.

It is not unusual that a union should engage in the concerted activity of staying on the job in order to preserve

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[15]Complainants were members of Locals 44, 80, 727 and 728 of the IATSE and the IATSE was their collective bargaining agent [R. 748-763, 766-770]. Like other organizations, unions act through their duly elected officers. The President of the IATSE issued written orders that members of the IATSE were to cross the picket lines [R. 763-764] and were to perform services in disregard of jurisdictional lines [R. 775]. He called a meeting of the IATSE group and directed the membership to perform any work which the producers asked be performed in order to keep the studios open [R. 223, 248, 538, 657-661]. He told them of his agreement with the producers to keep the studios open and to do the work necessary to that end [R. 223]. International Representative Brewer and Business Agent DuVal addressed meetings of IATSE members at Warner Bros. and other studios and advised them of the concerted action undertaken by the IATSE [R. 219-221, 224-225, 240, 249, 665, 687]. Virtually the entire membership of 10,000 concurred in this concerted activity [R. 667, 538-539].

itself. This situation occurs where rival unions are engaged in a jurisdictional dispute. If one union strikes for the purpose of compelling the employer to grant it jurisdiction over the employer's work to the exclusion of a rival union, the other union can save itself by joining with the employer in defeating the strike, and that is just what the IATSE did in this case. Finding itself in danger of destruction, it adopted its most potent weapon of defense —the maintaining of the studios in operation. If the studios were to remain in operation, the work abandoned by the strikers had to be performed. The IATSE undertook to perform that work, not because of any solicitude for the employer's welfare, but for the selfish purpose of preserving itself. It directed its members to join in the concerted activity which it undertook. Respondents, as they were required to do by the Act, dealt with the IATSE as the collective bargaining agent of members of the IATSE, including complainants. In defiance of their union's concerted activity, complainants engaged in their own personal and private form of activity which the Board has dignified by characterizing as a "strike." If such activity was a strike, it was at most a "wildcat" strike, in defiance of the concerted activity of complainants' own union.

NLRB v. Draper Corp. (4th Cir.), 145 F. 2d 199[16] squarely holds that such "wildcat" strike activity is not protected by the Act. There the company was engaged in collective bargaining with a union which it had recognized as the collective bargaining agent of its employees. During the course of the negotiations a minority group of employees decided that negotiations were not going to their satisfaction and engaged in a strike. The strike was

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[16]Cited with approval in *International Union v. Wisconsin Employment Relations Board*, 336 U. S. 245, 257, as an example of a type of concerted activity not protected by the Act.

not called or authorized or sanctioned by the union. The great majority of the employees continued at work. The question was whether the striking employees were engaged in a concerted activity protected by the Act. The Court, in a decision written by Judge Parker, held that the strikers' activity was not protected by the Act, saying:

> "The question is narrowed, then, to whether what was done amounts to an unfair labor practice within section 8(1) of the act. This depends on whether or not the 'wild cat' strike, in which the discharged employees were engaged, falls within the protection of section 7 of the act. If it does, a discharge on account thereof would clearly be interference and coercion with respect thereto within the meaning of section 8(1). *Cf.* Western Cartridge Co. v. N. L. R. B., *supra.* If it does not, the discharge and failure to reemploy would be justified and would furnish no basis for a finding of unfair labor practice.
>
> "* * * we are of opinion that the 'wild cat' strike in which the employees were engaged and for which they were discharged was not such a concerted activity as falls within the protection of section 7 of the National Labor Relations Act, but a strike in violation of the purposes of the act by a minority group of employees in an effort to interfere with the collective bargaining by the duly authorized bargaining agent selected by all the employees. The purpose of the act was not to guarantee to employees the right to do as they please but to guarantee to them the right of collective bargaining for the purpose of preserving industrial peace. * * *
>
> "It is perfectly clear not only that the 'wild cat' strike is a particularly harmful and demoralizing form of industrial strife and unrest, the necessary

effect of which is to burden and obstruct commerce, but also that it is necessarily destructive of that collective bargaining which it is the purpose of the act to promote. Even though the majority of the employees in an industry may have selected their bargaining agent and the agent may have been recognized by the employer, there can be no effective bargaining if small groups of employees are at liberty to ignore the bargaining agency thus set up, take particular matters into their own hands and deal independently with the employer. The whole purpose of the act is to give to the employees as a whole, through action of a majority, the right to bargain with the employer with respect to such matters as wages, hours and conditions of work. * * *

"A union selected as bargaining agent is thus made the exclusive representative of all the employees for the purpose of collective bargaining. As said in Virginian R. Co. v. System Federation, 300 U. S. 515, 548, 57 S. Ct. 592, 600, 81 L. Ed. 789, the law 'imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other.' See also McQuay-Norris Mfg. Co. v. N. L. R. B., 7 Cir., 116 F. 2d 748; Texarkana Bus Co. v. N. L. R. B., 8 Cir., 119 F. 2d 480, 484; North Electric Mfg. Co. v. N. L. R. B., 6 Cir., 123 F. 2d 887, 890. The employees must act through the voice of the majority or the bargaining agent chosen by the majority. Minority groups must acquiesce in the action of the majority and the bargaining agent they have chosen; and, just as a minority has no right to enter into separate bargaining arrangements with the employer, so it has no right to take independent action to interfere with the course of bargaining which is being carried on by the duly

authorized bargaining agent chosen by the majority. * * *

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"* * * No surer way could be found to bring collective bargaining into general disrepute than to hold that 'wild cat' strikes are protectd by the collective bargaining statute."

The purpose of the Act is, by the use of the processes of collective bargaining, to prevent interruptions of interstate commerce. The processes of collective bargaining under the Act impose upon the employer "the duty of conferring and negotiating with the authorized representatives of its employees for the purpose of settling a labor dispute," and "the negative duty to treat with no other." (*NLRB v. Jones and Laughlin Steel Corp.,* 301 U. S. 1, 144.) To hold that a strike of a minority group in defiance of the concerted activity undertaken by its own collective bargaining agent is a concerted activity protected by the Act would defeat the very purpose for which the statute was enacted. How can interruption of interstate commerce be prevented if the employer treats with the collective bargaining agent in such manner as to prevent such interruption and if, at the same moment, a minority group can, under protection of the Act, engage in an activity designed to cause an interruption of such commerce? The employer is prohibited from making a settlement with the minority group in order to induce them to return to work. If the employer should do so, it might result in enabling the minority group to control working conditions to the detriment of the majority group. It would certainly undermine the power and influence of the

majority group as effectively as any anti-union course of action which an anti-union employer might conceive. Strikes by minority groups in defiance of the concerted activity of their collective bargaining agent do not fit within the pattern of the Act. Section 7 of the Act does not protect such activities.[17] If the employer discharges or refuses reinstatement to employees because of such unprotected activities, he does not violate the Act. If he does not violate the Act, the Board is without authority to make any remedial orders against him.

Since the Board has found that respondents refused reinstatement to complainants because of their activity during the strike and since complainants' activity during the strike was in defiance of the concerted activity of their own union and was "wildcat" in nature and since such activity was not protected by the Act, respondents' refusal of reinstatement to complainants because of such activity was not a violation of the Act. In the absence of a violation of the Act, the Board is not empowered to order reinstatement of employees, with back pay.

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[17]There are persons in this country whose purpose is to foster industrial chaos for the purpose of accomplishing fundamental changes in our form of government. The wild cat strike is a weapon well adapted to their purposes. Congress did not intend that strikes of that character should be protected by the Act. To the contrary, the purpose of Congress was to achieve industrial peace through the processes of collective bargaining conducted by the chosen representative of the employees.

3. If Complainants Were Engaged in a Strike, It Was a Strike in Violation of an Agreement Between Respondents and the IATSE That IATSE Members Would Stay on the Job and Perform Services as Directed. A Strike in Violation of a Union-Employer Agreement Is Not a Concerted Activity Protected by the Act.

The Board concedes that the IATSE agreed with the producers to supply the producers with labor to maintain studio operations and that, in accordance with that agreement, it instructed its membership to perform whatever duties might be assigned, regardless of whether such work had previously been performed by IATSE members or by employees on strike (Pet. Br. 5). The evidence showed not only that the President of the IATSE had made an agreement with the producers to keep the studios running [R. 223], but also that pursuant to that agreement, Roy M. Brewer, as International Representative of the IATSE, offered to have IATSE members do carpenter work and other work abandoned by the CSU strikers at Warner Bros. studio and that respondent Warner Bros. accepted that offer [R. 869-90; 216-26; 240-41]. Complainants were members of the IATSE and the IATSE was their collective bargaining agent. The refusal of some of complainants to perform carpenter work and painting work as directed, and the refusal of others to continue at work was a violation of the agreement made by the IATSE with the producers.

A strike or other refusal to work in violation of a collective bargaining agreement is not a concerted activity protected by Section 7 of the Act. In *NLRB v. Sands Mfg. Co.*, 306 U. S. 332, the collective bargaining agreement provided for departmental seniority. The union demanded that departmental seniority be disregarded and threatened a strike unless the employer complied with its demands. The employer closed its plant and refused to

engage in further negotiations with the union. Subsequently the employer reopened its plant with employees recruited from another union. The court regarded the activities of the employees in breach of the collective bargaining agreement as activities which were not protected by the Act, and held that the employer was justified in discharging the employees because of such activities. In *International Union v. Wisconsin Employment Relations Board,* 336 U. S. 245, 257, the court cites the *Sands* decision as an example of a type of concerted activity which is not protected by Section 7 of the Act. In accordance with the *Sands* decision, the Courts of Appeal and the Board have recognized that strikes in violation of collective bargaining agreements are not concerted activities protected by the Act. (*United Biscuit Co. v. NLRB* (7th Cir.), 128 F. 2d 771, 775; *Hazel-Atlas Glass Co. v. NLRB* (4th Cir.), 127 F. 2d 109, 118; *National Electric Products Corp.,* 80 NLRB 995, 999; *Fafnir Bearing Co.,* 73 NLRB 1008, 1011; *Joseph Dyson & Sons, Inc.,* 72 NLRB 445, 447.)

Since the Board has found that complainants engaged in a strike [R. 10] and that respondents refused reinstatement to complainants because of their activity during the strike, and since complainants' activity during the strike was in violation of the agreement made by their union with respondents and the other producers, such activity was not protected by the Act and respondents' refusal of reinstatement to complainants because of such activity was not a violation of the Act. In the absence of a violation of the Act the Board is not empowered to order reinstatement of employees, with back pay.

4. If Complainants Were Engaged in a Strike, It Was a Strike for the Purpose of Compelling Respondents to Commit an Unfair Labor Practice. A Strike for Such a Purpose Is Not a Concerted Activity Protected by the Act.

It is well settled that if an employer recognizes one of two competing unions during the pendency of a representation proceeding being conducted by the Board for the purpose of determining which of the two unions shall represent employees in an appropriate unit for purposes of collective bargaining, such employer is guilty of an unfair labor practice. The leading decision establishing this principle is *Midwest Piping & Supply Co., Inc.*, 63 NLRB 1060. There, after a representation proceeding had been instituted by the Board, the employer recognized and negotiated a contract with one of the two competing unions. In holding this to be an unfair labor practice the Board said, at page 1070:

> "The record shows that both the Steamfitters and the Steelworkers had vigorously campaigned in the plant, had apprised the respondent of their conflicting majority representation claims, and *had filed with the Board conflicting petitions, which are still pending,* alleging the existence of a question concerning the representation of the employees covered by the agreement. Under such circumstances, the Congress has clothed the Board with the exclusive power to investigate and determine representatives for the purposes of collective bargaining. In the exercise of this power, the Board usually makes such determination, after a proper hearing and at a proper time, by permitting employees freely to select their bargaining representatives by secret ballot. *In this case, how-*

ever, the respondent elected to disregard the orderly representative procedure set up by the Board under the Act, for which both unions had theretofore petitioned the Board, and to arrogate to itself the resolution of the representation dispute against the Steelworkers and in favor of the Steamfitters. In our opinion such conduct by the respondent contravenes the letter and the spirit of the Act, and leads to those very labor disputes affecting commerce which the Board's administrative procedure is designed to prevent.

"We further find that the respondent's aforementioned conduct also constitutes a breach of its obligation of neutrality. As we have previously held, a neutral employer, on being confronted with conflicting representation claims by two rival unions, 'would not negotiate a contract with one of them until its right to be recognized as the collective bargaining representative had been finally determined under the procedure set up under the Act.' * * *.

"We are of the opinion and find that the respondent, by executing a 'union shop' agreement with the Steamfitters in the face of the representation proceedings pending before the Board, indicated its approval of the Steamfitters, accorded it unwarranted prestige, encouraged membership therein, discouraged membership in the Steelworkers, and thereby rendered unlawful assistance to the Steamfitters, which interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act." (Italics added.)

The principle has been applied by the Board in other decisions in which, during the pendency of a representa-

tion proceeding, the employer either recognized or negotiated a contract with one of the two competing unions.[18]

The Supreme Court in *NLRB v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 267, has said, in affirming a Board order against an employer who actively favored one of two competing labor organizations:

> "Once an employer has conferred *recognition* on a particular organization it has a marked advantage over any other in securing the adherence of employees." (Italics added.)

The courts of appeal have uniformly enforced Board orders against employers who accord contrasting treatment to rival unions with regard to collective bargaining.[19]

Prior to the CSU strike, petitions had been filed with the Board, both by Local 1421 of the Painters Union, and by the employers requesting the Board to determine and certify the collective bargaining representative for Set Dressers. Section 9(c) of the Act in effect at that time provided that:

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[18]*Precision Castings Co., Inc.*, 30 NLRB 221, 226; *Elastic Stop Nut Corp.*, 61 NLRB 694, 702, enforced *NLRB v. Elastic Stop Nut Corp.* (8th Cir.), 142 F. 2d 371, 380, cert. den. 323 U. S. 722; *Keystone Steel & Wire Co.*, 62 NLRB 683, 700; *John Engelhorn & Sons*, 42 NLRB 866, enforced (3rd Cir.) 134 F. 2d 553; *Phelps Dodge Copper Products Corp.*, 63 NLRB 686, 687.

[19]*Berkshire Knitting Mills v. NLRB* (3rd Cir.), 139 F. 2d 134, 139, cert. den. 332 U. S. 747; *NLRB v. Rock Hill Printing and Finishing Co.* (4th Cir.), 131 F. 2d 171, 174; *NLRB v. Southern Wood Preserving Co.* (5th Cir.), 135 F. 2d 606, 607; *Western Cartridge Co. v. NLRB* (7th Cir.), 134 F. 2d 240, 243, cert. den. 320 U. S. 746; *NLRB v. Idaho Refining Co.* (9th Cir.), 143 F. 2d 246, 248.

"Whenever a question affecting commerce arises concerning representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected."

The Board had determined that a question affecting commerce concerning the representation of Set Dressers existed, for it had, commencing March 7, 1945, entered upon an investigation of that question by commencing the conducting of a hearing after due notice to the interested parties. Local 44 of the IATSE had intervened in that proceeding. Not only was there a question as to representation of Set Dressers, but there was also a question with respect to the appropriate unit in which Set Dressers should be included for purposes of collective bargaining. Local 1421 of the Painters Union contended that Set Dressers should be included in a unit consisting of Set Designers, Sketch Artists, Illustrators, Assistant Costume Designers, Costume Illustrators, and Model Builders. Local 44 of the IATSE claimed that Set Dressers should be included in a unit consisting of Property Men and the other classifications of employees represented by said Local 44 (61 NLRB 1030, 1035-36). Thus, there existed a real question with respect to the appropriate unit in which Set Dressers should be included and a real question as to whether Local 1421 of the Painters Union or Local 44 of the IATSE represented the employees in that appropriate unit. Under such circumstances if the producers, including respondents, had recognized Local 1421 of the Painters Union as the collective bargaining agent

of Set Dressers, they unquestionably would have been guilty of an unfair labor practice.[20]

The Board concedes that the strike was called for the purpose of compelling the producers to recognize Local 1421 of the Painters Union as the collective bargaining agent of Set Dressers (Pet. Br. 5). The Trial Examiner refused to take official notice of the pendency of the representation proceeding involving Set Dressers, not because it was a matter outside the official knowledge of the Board, but because he regarded the fact of the pendency of the representation proceeding as immaterial [R. 144-145]. Exception was taken to the Trial Examiner's ruling. This is not a case in which respondents requested that the Board take official notice of matters found to be facts by the Board in an earlier proceeding in lieu of proof of those facts; *cf. NLRB v. Townsend* (9th Cir., September 11, 1950), 26 LRRM 2561. It is conceded that the propriety of using facts found by the Board in another proceeding as evidence in this proceeding would be doubtful, and respondents did not and do not request that judicial notice be taken of any facts found by the Board in any prior proceeding. Respondents do ask,

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[20]On May 7, 1945, during the course of the strike, the Board rendered its decision as to the appropriate unit and ordered an election (61 NLRB 1030). At the election, ballots were challenged by both of the contesting unions, and the Board ruled that both the strikers and the replacements were entitled to vote (64 NLRB 490). In making that ruling, the Board held that it was unnecessary to determine whether or not the producers would have engaged in an unfair labor practice had they recognized the striking union as the collective bargaining agent of Set Dressers, 64 NLRB 490, stating at page 511: "We find it unnecessary to decide whether or not it would have been an unfair labor practice had the producers granted recognition, the object sought by the Painters; * * *." In a subsequent decision, *Thompson Products, Inc.*, 70 NLRB 13, 17, the Board pointed out that its decision to permit strikers to vote in the *Columbia Pictures* case was not intended as a repudiation of the *Midwest Piping & Supply Company* principle.

however, that judicial notice be taken of the fact that there *was* a prior proceeding,—the fact, shown by the official records of the Board and read into the transcript in the hearing before the Trial Examiner, that there was pending before the Board on March 12, 1945, when the strike was called, a representation proceeding which was being conducted by the Board for the purpose of determining whether the striking union or the IATSE should be designated as the collective bargaining agent of Set Dressers. The pendency of that proceeding is a fact within the official knowledge of the Board.[21] The pendency of that proceeding appears in the official reports of the Board's proceedings, printed by the United States Government, 61 NLRB 1030, and is a fact of which this Court may take judicial notice.[22]

It is undisputed that the CSU strike was called for the purpose of compelling the producers to recognize Local 1421 of the Painters Union as the collective bargaining agent of Set Dressers, and that it was called in the midst of the representation hearing being conducted by the Board for the purpose of determining whether Local 1421 of the Painters Union or Local 44 of the IATSE should be designated as the collective bargaining agent of Set Dressers. Since it would have been an unfair labor practice for the producers to have recognized Local 1421 as

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[21]In *Pittsburgh Plate Glass Co. v. NLRB,* 313 U. S. 146, 157, the Supreme Court held that the Board properly took official notice of what had occurred in a representation proceeding involving the same parties.

[22]The courts will take judicial notice of the reports of U. S. commissions (*Greeson v. Imperial Irrigation District,* 9th Cir., 59 F. 2d 529, 531); of publications made by a department of the U. S. Government (*Atlantic Transport Co. v. Rosenberg Bros. & Co.,* 9th Cir., 34 F. 2d 843, 845); of opinions of the Secretary of Interior (*U. S. v. Brewer-Elliott Oil & Gas Co.,* D. C. Okla., 249 Fed. 609, 619); of reports of executive departments of the U. S. Government (*Tolfree v. Weitzler,* D. C. N. J., 22 F. 2d 214, 216); of public records (*Caha v. U. S.,* 152 U. S. 211, 221).

the collective bargaining agent of Set Dressers during the pendency of the representation hearing, the question here presented is whether a strike called for the purpose of compelling the producers to violate the National Labor Relations Act constitutes a concerted activity protected by the Act.

The answer to this question is obvious. A strike called for the purpose of compelling an employer to violate the Wage Stabilization Act is not a concerted activity protected by the Act (*American News Company,* 55 NLRB 302; *NLRB v. Indiana Desk Co.* (7th Cir.), 149 F. 2d 987). The *Indiana Desk Co.* case is one of the cases cited by the Supreme Court in *International Union v. Wisconsin Employment Relations Board,* 336 U. S. 245, 257, as an example of a concerted activity which is not protected by the Act. If a strike for the purpose of compelling an employer to violate the Wage Stabilization Act is not an activity protected by the Act, *a fortiori* a strike for the purpose of compelling an employer to violate the National Labor Relations Act is not a concerted activity protected by that Act. While the majority of the Board in *Columbia Pictures Corp.,* 64 NLRB 490, held that it was unnecessary, in passing upon the right of strikers to vote, to determine whether the producers would have committed an unfair labor practice had they recognized Local 1421 of the Painters Union during the pendency of the representation proceeding, one of the three members of the Board thought that the question of the validity of the strike should have been determined and in discussing this question he said, at page 527:

> "This admission in the Painters' brief reveals the avowed objective of the strike was to compel the Producers to commit an act which we have repeatedly held is an unfair labor practice in direct contravention of the purposes and provisions of the Act it is our

> duty to administer. If we may not ignore strike attempts to compel violations of other Congressional legislation, it would seem absurd to deem a strike which had no other purpose than to bring about a violation of this very statute within the scope of the 'concerted activity' which Congress meant to protect."

The Board's decision which it seeks to have enforced refers to complainants as strikers. The evidence does not show that they actively participated in the strike, but since they acted in support of the strike, their unlawful concerted activity would no more be protected than the activity of the strikers who engaged in the picketing. In *Hazel-Atlas Glass Co. v. NLRB,* 127 F. 2d 109, six operators struck in violation of their union contract and the court held that under the *Sands* case, their strike activity was not protected by the Act. A foreman named Carder engaged in strike activity in sympathy with the strikers. The court, in holding that neither the strikers' nor Carder's activity was protected by the Act, said:

> "Carder's discharge was justified on this ground, for certainly if the discharge of operators who have struck illegally, is justified, the discharge of one who refuses to work because the strike is on is also justified."

Since the Board has found that respondents refused reinstatement to complainants because of their activity during the strike, and since complainants' activity during the strike was in support of a strike which had as its purpose the compelling of respondents to commit an unfair labor practice, and since activities in support of such a strike are not protected by the Act, respondents' refusal of reinstatement to complainants because of such activity was not a violation of the Act. In the absence of a violation of the Act, the Board is not empowered to order reinstatement of employees, with back pay.

5. **The Complainants Who Refused to Perform Services as Directed, While Continuing to Claim Rights as On-Payroll Employees, Were Not Engaged in Concerted Activities Protected by the Act.**

After the CSU members had walked off their jobs in an attempt to force the producers, including respondents, to award one of their member unions the disputed jurisdiction over Set Dressers, most of the IATSE members then employed by the studios were directed by their employers to perform the work that had to be done to keep the studios operating. Some few of them, including most of the complainants, affirmatively refused to do that work in spite of the fact that their own union had agreed with the producers that its members would do such work and had ordered such members to perform the jobs vacated by strikers.

In failing to carry out such directions of their employers, complainants arrogated to their individual selves the right to determine what directions of their employers they would or would not obey. In effect, they demanded the right to continue as employees—of course, with the compensation of employees—while simultaneously refusing to perform the duties delegated to them by their employers and enjoined upon them by their own collective bargaining agent. Such a refusal resulted, as it should have, in the discharge of some and in others being told either to report to their union or to go home.[23]

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[23]As recited in the Statement of the Case, Sapp, White, Stoica, Batchelder, Hand, Lora, Bonning, Gidlund, MacKellar, Rogers, De Sanctis, Lamb, Simpson and Jensen were discharged. Larson was directed to go home. Seward and Selgrath were directed to report to their local unions. All were replaced.

Respondents were clearly warranted in refusing reinstatement to such employees because of such insubordination. Such insubordination is not a concerted activity protected by the Act. In *NLRB v. Montgomery Ward & Co.* (8th Cir.), 157 F. 2d 486, the union employees at the Company's Chicago plant went on strike. Some Chicago orders were rerouted to the Kansas City branch. Three employees in the Billing Department of the Kansas City branch were asked to process Chicago orders. These employees were members of the union which was striking the Chicago plant and believed that by being asked to process the Chicago orders, they were being asked to do strikers' work. They failed to process the orders as directed by the Company. The Company told them they would have to process the Chicago orders. They refused and were discharged. The Board held that they were engaged in a concerted activity protected by the Act and ordered their reinstatement. The court refused to enforce the Board's order, saying at page 497:

> "The Board was in error in holding that by refusing to process the Chicago orders these employees engaged in lawful assistance of their union, protected by Section 7 of the Act."

In *United Biscuit Co. v. NLRB* (7th Cir.), 128 F. 2d 771, the Company's drivers and shippers were on strike. The Company employed men to replace them and continued to carry on its business. It had not theretofore been the duty of the Company's fifteen salesmen to ride on or follow the Company's delivery trucks. The Company's salesmen were members of the same union as were the striking drivers and shippers. The Company directed that its salesmen ride on or follow the Company's de-

livery trucks which were being operated by men employed to replace the striking drivers and shippers. The fifteen salesmen refused to work as directed. The Company discharged them, and the Board held that such discharge was in violation of the Act. The court held that the Board's order was not supported by the fact that the Company discharged the salesmen for refusing to ride on or follow the Company's delivery trucks as directed, but held there was other activity of the Company with respect to these employees which would support the Board's order.

In *Hazel-Atlas Glass Co. v. NLRB* (4th Cir.), 127 F. 2d 109, six operators were directed to clean their machines as a part of their duties. They struck in violation of their collective bargaining contract. Carder was a foreman and the Company directed him and two other foremen to operate the machines which the strikers had abandoned. When Carder refused, the Company discharged him. The Board held that such discharge was an interference with rights of Carder which were protected by the Act. The court refused to enforce the Board's order, saying:

> "It cannot be that an employer is forbidden to discharge a foreman who aids an unlawful strike by refusing to obey the lawful orders of his master because the strike is in progress."

In *C. G. Conn, Ltd. v. NLRB* (7th Cir.), 108 F. 2d 390, the regular workweek of employees during the Christmas season had been about fifty-seven and one-half hours per week. Employees refused to work overtime as directed by the Company. The Company discharged them. The Board called these discharges "a tactical maneuver," and held that the employees were on strike and that the employer's refusal to reinstate them was an unfair labor practice. The court refused to enforce the Board's order, holding that the employees' activity was

not protected by the Act, and that the employer had the right to and did discharge the employees because of their insubordination.

In *Home Beneficial Life Insurance Co. v. NLRB* (4th Cir.), 159 F. 2d 280, cert. den., 332 U. S. 758, the employer discharged employees employed as insurance salesmen and collection agents because they refused to report to their offices each morning as required by their employer. The Board called the discharge "a tactical maneuver" and held that the employer's refusal to reinstate these employees was an unfair labor practice. The court refused to enforce the Board's order, holding that the employees' refusal to perform services as directed was not a concerted activity protected by the Act.

In the case at bar the Board has found that respondents discriminated against complainants because of their activities during the strike. The only activities carried on by the complainants who were discharged were their refusals to perform services as directed. Since these activities were not concerted activities protected by the Act, respondents' refusal to reinstate them because of such activities did not constitute a violation of the Act, and the Board is without power to order reinstatement with back pay with respect to such complainants.

6. Since Complainant's Activities Were Not Protected by the Act, Respondents Were Privileged to Discharge or Refuse Reinstatement to Complainants Because of Such Unprotected Activities.

It is elementary that, so far as the National Labor Relations Act is concerned, an employer has the right to discharge or refuse reinstatement to an employee for any reason or for no reason, except that he cannot discharge or refuse reinstatement to an employee because of the employee's exercise of rights guaranteed by the Act. In

NLRB v. Condenser Corp. (3rd Cir.), 128 F. 2d 67, 75, the court said:

> "The Board does not dispute the contention that the employee may be discharged by the employer for a good reason, a poor reason, or no reason at all, so long as the terms of the statutes are not violated."

See also:

NLRB v. Tex-O-Kan Flour Mills Co. (5th Cir.), 122 F. 2d 433, 438;

American Smelting Co. v. NLRB (8th Cir.), 126 F. 2d 680;

NLRB v. Williamson-Dickey Mfg. Co. (5th Cir.), 130 F. 2d 260;

NLRB v. West Ohio Gas Co. (6th Cir.), 172 F. 2d 685.

Since the activities of complainants in engaging in a wild cat strike, in violating the agreement made by their union with respondents, in joining in a strike for the purpose of coercing respondents into committing an unfair labor practice, and in refusing to perform services as directed, are not activities protected by the Act, there is nothing in the Act which prohibits respondents from discharging or refusing reinstatement to complainants because of such unprotected activities. Such conduct of complainants, not constituting concerted activities protected by the Act, is conduct which can properly be made the basis of discharge or refusal of reinstatement. It is not the function of the Board to police employers except to the extent that employers interfere with rights of employees which are guaranteed by the Act.

II.

Even if Respondents Had Agreed to Reinstate Complainants, Such Agreement Could Not Transform Into a Concerted Activity Protected by the Act, That Which Is Not a Concerted Activity Protected by the Act. The Board Is Not Empowered to Enforce Agreements; It Is Only Empowered to Remedy Infringements of Rights Protected by the Act.

It is abundantly clear for each of the reasons above stated that the activities of complainants were not activities protected by the Act and, hence, not within the province or power of the Board to affect by its order. The Board practically concedes this in its opinion and brief. It says, however, that because (as it erroneously construes the evidence) the respondents agreed to reinstate the complainants in spite of their admittedly unprotected acts, the Board becomes miraculously vested with the jurisdiction to protect such unprotected acts and to order the reinstatement of persons who, because of their activities in contravention of the policies expressed in the Act, would otherwise properly be denied any relief. Such a position is wholly without judicial precedent and, we submit, is indefensible as a matter of law.

The Board has construed the Cincinnati Directive not only as a directive that the members of the unions that engaged in the strike (the CSU unions) should return to work, but also as a directive that the members of the IATSE who refused to perform services as directed or who remained away from work should return to work. The Board found that respondents agreed to abide by the Directive. The Board's construction of the Cincinnati

Directive is erroneous, and there is no substantial evidence that respondents agreed to abide by the Directive. The conduct of respondents in refusing reinstatement to the insubordinate IATSE members indicates that there was no agreement to reinstate such IATSE members. However, even if it were to be assumed that the Board's construction of the Directive is correct and if it were to be assumed that there is substantial evidence supporting the Board's finding that the respondents agreed to abide by the Directive, nonetheless respondents' refusal to reemploy the insubordinate IATSE members was not an unfair labor practice because such IATSE members were not engaged in activities protected by the Act. The members of the Board closed their eyes and minds to the fact that in order to hold respondents guilty of a violation of the Act, they would be required to find that some right of complainants protected by Section 7 of the Act was interfered with, and the Board failed so to find. Instead, the Board's decision states:

> "The crux of respondents' unlawful discrimination is the disparity between their treatment of the complainants and their treatment of the CSU strikers after having agreed to treat all alike. Accordingly, we find it unnecessary to decide herein whether or not, during the strike, the complainants were engaged in protected concerted activity." [R. 18.]

The members of the Board erred in that conclusion. The crux of the problem in this proceeding is that complainants engaged in activities which were not protected by the Act and were refused reemployment because they had engaged in such activities. The Act does not require respondents to accord all employees or former employees equal privileges with respect to reinstatement. The employer is free to discriminate between employees for any reason other than for the reason that the employees engaged in activities

which are protected by the Act. Discrimination because of unprotected activities of employees is not violative of the Act.

This proposition is well settled in a decision which is squarely in point. In *NLRB v. Fansteel Corp.,* 306 U. S. 250, the employees had engaged in a sit-down strike, a concerted activity which is not protected by the Act. At the conclusion of the strike, the employer reemployed some of the sit-down strikers but refused employment to others. The Board held that this discriminatory treatment of some of the sit-down strikers was a violation of the Act. The Supreme Court ruled to the contrary, holding that refusal of employment to employees because they engaged in a concerted activity not protected by the Act was not an unfair labor practice and that the employer was free to reemploy some sit-down strikers and to refuse reemployment to others. Referring to the fact that the employer reinstated "many," but not all of the sit-down strikers, the Court said, at page 259:

> "The Board stresses the fact that, when respondent was able to obtain possession of its buildings and to resume operations, it offered reemployment to *many* of the men who had participated in the strike. The contention confuses what an employer may voluntarily and legally do in the exercise of his right of selection and what the Board is entitled to compel. * * *
>
> "We find it unnecessary to consider in detail the respective contentions as to respondent's offer of reemployment, for we think that its action did not alter the unlawful character of the strike or respondent's rights in that aspect. The important point is that respondent stood absolved by the conduct of those engaged in the 'sit-down' from *any duty* to reemploy them, but respondent was nevertheless free to consider the exigencies of its business and to offer reemploy-

ment if it chose. In so doing it was simply exercising its normal right to select its employees." (Italics added.)

The Court of Appeals in *Wilson & Co. v. NLRB* (7th Cir.), 120 F. 2d 913, reached the same conclusion, stating with respect to the fact that the employer reemployed some sit-down strikers and refused reemployment to others:

> "It therefore appears that there is little, if any, room for argument but that petitioner was within its rights in its position that it be accorded the privilege of selecting from those guilty of violence, the ones which it would reinstate."

The situation is no different in the case at bar. Here, claimants were engaged in activities which were not protected by the Act and respondents refused them reemployment because of such activities. The fact that respondents reemployed others who engaged in such activities is immaterial. Respondents did not refuse reemployment to complainants because they had engaged in any activity *protected* by the Act; respondents refused reemployment to them because they had engaged in *unprotected* activities.

Petitioner's unsound conclusion that respondents agreed to reemploy all strikers does not bolster its case. If complainants were engaged in activities which were not protected by the Act, those activities did not become protected simply because respondents made a purported agreement to reemploy complainants as well as the CSU strikers. If respondents had made such an agreement it would have been a breach of the agreement to have failed to reemploy complainants. However, a breach of such an agreement is not an unfair labor practice. An unfair labor practice occurs only when the employer violates some right guaranteed by the Act. Complainants' activities were not protected by the Act and respondents' refusal of employment

to complainants because they engaged in such activities cannot be made a violation of the Act by virtue of some agreement.

The decisions cited by petitioner in support of its contention do not support the contention. In *NLRB v. Aladdin Industries, Inc.* (7th Cir.), 125 F. 2d 377, the Board sought to have enforced an order which had two separate provisions. One provision of the order required the employer to cease and desist violating the Act by questioning its employees concerning their union activity; by seeking to establish an independent union in opposition to the complaining union; and by circularizing its employees with a letter attacking the complaining union. The other provision of the order required the employer to cease and desist violating the Act by discriminatorily refusing to reinstate ten union employees following a strike, thereby discouraging membership in the union. The Board's findings upon which it based a violation of the Act by questioning its employees, etc., as above described, were with respect to incidents which occurred prior to March 25, 1937, when the employer offered to accept applications for employment from sit-down strikers. The Board's findings upon which it based a violation of the Act by refusing reinstatement to ten employees were that such reinstatement was denied "because they had applied for employment through the union and thus indicated a partisan adherence to said union."

The evidence showed that on March 25, 1937, the Company offered to receive applications for employment upon forms furnished by the Company with the understanding that such applications would be considered upon the basis of the qualifications of the employees for the job opportunities which were available. The ten complainants who were refused reinstatement and whom the Board ordered reinstated, made applications through the union instead of upon the forms furnished by

the Company, and the Company refused to reinstate them. Unlike the case at bar, the employer in the *Aladdin* case did not refuse reinstatement because of the fact that the employees had engaged in activities unprotected by the Act (*i. e.,* in a sit-down strike). The employer there did not even contend and the Board did not find that participation in the sit-down strike was the reason for refusing these ten employees reinstatement (22 NLRB 1195, 1220). (In the case at bar the Board has found that respondents refused reinstatement to complainants because they engaged in activities which are clearly outside the protection of the Act.) Instead, in the *Aladdin* case, the Board found that "the employer denied reinstatement to these ten employees because they had applied for employment through the union and thus indicated a partisan adherence to said union" (*NLRB v. Aladdin Industries, Inc., supra,* p. 384; 22 NLRB 1195, 1224-1232), and the court held that "The finding of the Board that they were not reemployed because their applications were made through the union must be sustained." (P. 386.)

Thus, with respect to reinstatement of the ten employees who were discriminated against because of their partisan adherence to the union (and not because they had engaged in a sit-down strike), there was no question of "condonation" or "waiver." The *Aladdin* case thus does not support the Board's anomalous theory that by "condonation" or "waiver," an employer can transform an activity which is not protected by the Act into an activity protected by the Act. Such a proposition was not even involved in that case. The language which petitioner quotes in its brief (Pet. Br., 26) was addressed to the question of whether the court should enforce the Board's order with respect to unfair labor practices in violation of Section 8(1) of the Act which occurred prior to the date when the employer offered to accept applications for reinstatement from the members of

the union that had called the sit-down strike. The court refused to enforce that portion of the Board's order, stating that it believed that the employer's offer to receive applications for reinstatement and the acceptance of that offer by the employees constituted the turning over of a new leaf and that grievances antedating that treaty of peace were waived, both by the employer and by the employees. What the court would have ruled had the employer sought to refuse employment to sit-down strikers because of the fact that they had engaged in such an illegal activity was not decided.

As a matter of fact, when the *Aladdin* case was before the Board there were, in addition to the ten employees, some sixty-three employees that had been discharged by the Company because of their participation in the sit-down strike. They were complainants and sought reinstatement. The Board held that they were not entitled to reinstatement and dismissed the complaint as against them (22 NLRB 1195, 1221). The Board did not hold that the employer "condoned" or "waived" the illegal activity of these employees by offering to accept applications for reinstatement and that thereby their unprotected concerted activity became a protected concerted activity. It seemed to recognize, at that time, that activities unprotected by the Act could not be transformed into activities protected by the Act simply by the mere fact that the employer subsequently made an agreement to reinstate all employees.

The Board has also cited *Stewart Diecasting Corp. v. NLRB* (7th Cir.), 114 F. 2d 849, in support of its contention that an agreement to reinstate employees has the effect of transforming unprotected activities into protected activities. The decision in that case does not support the Board's contention. There, between 75 and 100 out of a total of 685 employees engaged in a sit-down strike on March 17, 1937. It lasted for only twenty-four hours.

The employer closed the plant but did not discharge the sit-down strikers. On March 23, 1937, after the sit-down strike had terminated, the union representing the majority of the employees requested recognition. The employer refused such recognition. The union then called a conventional strike because of such refusal of recognition. Thereafter the employer reopened its plant and filled the jobs of some of the strikers. On June 24, 1937, the strike was settled upon the agreement of the employer to reinstate strikers if and when vacancies occurred. The employer refused to discharge the replacements theretofore hired, and therefore there were not jobs for all of the strikers and the employer refused reinstatement to some of them. The Board held that the conventional strike called by the union was caused by the employer's unfair labor practice of refusing to recognize the union; that the employer was required to create vacancies by discharging employees hired since that date, and that the refusal of the employer to reinstate the strikers was an unfair labor practice.

Unlike in the case at bar, the employer in the *Stewart Diecasting* case did not refuse reinstatement to the employees because they had engaged in activities not protected by the Act (*i. e.,* in a sit-down strike). The Board said in its decision that "No contention was made by the respondent at the hearing that any of the striking employees were discharged or refused reinstatement at any time because of their participation in the sit-down strike." (14 NLRB 872, 896.) The record did not even show (with the exception of twelve or fourteen Board witnesses who admitted that they participated in the sit-down strike) which of the employees who were refused reinstatement had participated in the sit-down strike. (*Stewart Die-*

casting case, p. 856.) All of the employees who were refused reinstatement were members of the union and had participated in the conventional strike which followed the employer's refusal to recognize the union. The Board held that the employer had refused them reinstatement "because of their membership in, and activity on behalf of, the union." (P. 851.) Thus, the question of whether an employer who has agreed to reinstate all strikers can lawfully refuse reinstatement to some because they engaged in unprotected activities was not presented in the *Stewart Diecasting* case.

Hazel-Atlas Glass Co. v. NLRB (4th Cir.), 127 F. 2d 109, instead of supporting petitioner's contention, actually supports respondents' contention. There six employees went out on a strike in violation of their collective bargaining agreement. Under the *Sands* case their strike was not a concerted activity protected by the Act. A foreman named Carder, when asked to perform work abandoned by the strikers, refused to do so and joined in the strike activity. Subsequently, the employer reinstated the six employees but refused reinstatement to Carder. The Board held that this discriminatory treatment of Carder was a violation of the Act but the court, upon rehearing held that the activities of the six employees and of Carder were not protected by the Act, in view of the *Sands* case, and that the refusal of the employer to accord the same privilege of reinstatement to Carder as was accorded to the six employees was not a violation of the Act. The language from the *Hazel-Atlas* decision which petitioner quotes at page 27 of its brief to the effect that strikers are "entitled to even handed treatment" is *dictum* and read in the background of the whole decision was simply an obser-

vation that strikers who are engaged in concerted activities *protected* by the Act are entitled to even handed treatment and that the employer cannot discriminate against one of them because he engaged in a concerted activity which is *protected* by the Act. The *decision* in the *Hazel-Atlas* case is consistent with the Supreme Court's decision in the *Fansteel* case and supports our contention that where employees engage in activities which are *not* protected by the Act, the employer can reinstate some of such employees and refuse employment to others because of such unprotected concerted activities without violating the Act.

In *NLRB v. Mt. Clemens Pottery Co.* (6th Cir.), 147 F. 2d 262, cited by petitioner in support of its contention, the Board had refused reinstatement to an employee that had been convicted of malicious destruction of property during a strike, but had ordered reinstatement of an employee who had been convicted of assault and battery during the same strike. The court held that violence during a strike is not a concerted activity protected by the Act, and refused to enforce the Board's order to reinstate the employee who had been convicted of assault and battery. The employer contended that the violence during the strike absolved it of the obligation to reinstate any of the strikers. The court held, with respect to this contention, that:

> "The violence of these two employees, so clearly established by their conviction, is not, however, to be imputed to other union members in the absence of proof that identifies others as participating in such violence." (p. 268.)

The court inferred that if any of the other strikers whose reinstatement had been ordered could be proved to

have been guilty of violence during the strike, the court would have refused to enforce the order for their reinstatement. However, it stated in passing and by way of *obiter dictum* that many employees who had been *charged* with violence (but not convicted) had been taken back by the employer and that "to some extent, at least, their violence was condoned." This is a far cry from holding that an employer can, by entering into an agreement, make an unfair labor practice out of that which is not an unfair labor practice.

If, as we contend, the activity of complainants during the strike was not an activity protected by the Act, and if, as the Board has found, respondents refused reinstatement to complainants because of such unprotected activities, then even if respondents had agreed to take back claimants at the end of the CSU strike (which is denied), respondents' failure to carry out the purported agreement would not transform unprotected activities into protected activities. The power of the Board is limited to remedying unfair labor practices. If complainants' activities were not protected by the Act and if respondents' refusal to reinstate complainants because of such activities was not an unfair labor practice, then the Board is without power or jurisdiction to make an order against respondents simply because they made a purported agreement and did not carry it out. The Board has no right to usurp the functions of the judiciary and to arrogate to itself the power to impose sanctions for breach of a purported agreement. Complainants' remedy for breach of a purported agreement is in an ordinary civil action.

III.

In Any Event the Board's Finding That Respondents Agreed to Reinstate Complainants Is Not Supported by Substantial Evidence; Such Evidence as There Is Shows That No Such Agreement Was Made.

1. The Evidence With Respect to the Issuance of the Cincinnati Directive and With Respect to What Respondents Agreed to Do in Applying the Directive Is Hearsay and Therefore Is Not Reliable, Probative, and Substantial Evidence. But if Such Evidence Is to Be Given Credence, It Affirmatively Shows, Without Contradiction, That Respondents Did Not Agree to Reinstate Complainants.

The Trial Examiner found that while the strike was in progress between October 15 and 24, 1945, the Executive Council of the American Federation of Labor met at Cincinnati and issued a directive [R. 158]. The Trial Examiner thereafter referred to the directive as the "Cincinnati Directive" [R. 160, 163, 164]. A copy of the Directive was recited in the decision of Felix H. Knight, W. C. Birthright and W. C. Doherty, as the Executive Council Committee of the American Federation of Labor, appointed to settle the Hollywood jurisdictional controversy pursuant to the terms of said Directive [R. 731-745]. In its decision the Board referred to the Cincinnati Directive as the "Cincinnati Agreement" and found that respondents had "accepted" the Directive [R. 12] and had "obligated" themselves and had "agreed" to reinstate all striking employees, including complainants whom it referred to as "strikers" [R. 10]. In its brief petitioner asserts that the "parties" (apparently intending to include respondents) "agreed to submit the dispute to the Executive Council of the American Federation of Labor" (Pet. Br. 6-7) and refers to respondents as "binding themselves to the terms

of the Cincinnati Agreement" [R. 11] and as "committing themselves to the terms of the Cincinnati Agreement" [R. 13 and 10]. There is no substantial evidence that respondents agreed to submit the dispute to the Executive Council of the American Federation of Labor or that respondents accepted or agreed to the terms of the Cincinnati Directive or obligated themselves to or agreed to reinstate complainants or bound or committed themselves to abide by the Cincinnati Directive.

None of the evidence with respect to the Cincinnati Directive meets the standards prescribed by Section 7(c) of the Administrative Procedure Act (60 Stat. 237, 5 USC 1001, *et seq.*). Section 7(c) of that Act provides, in part, as follows:

> "* * * no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the *reliable, probative* and *substantive* evidence." (Italics added.)

All of the testimony with respect to the Cincinnati Directive is hearsay. No witness was called that had any personal knowledge of the fact of the issuance of the Directive, and no witness was called that had any personal knowledge of what the producers' representative in Cincinnati, Mr. Eric Johnston, obligated respondents to do with respect to the Directive. The Directive itself was admitted in evidence as a part of the decision of the Executive Council Committee in which Felix H. Knight, W. C. Birthright and W. C. Doherty made the unsworn assertion, as members of that Committee, that the Executive Council had "handed down" the Directive recited in that decision [R. 731-745]. The decision of the Executive Council Committee was admitted in evidence [R. 342], and thus the Directive became a part of the record in this

proceeding by way of the hearsay statements of Messrs. Knight, Birthright and Doherty found in the decision of the Executive Council Committee. The Directive provides that "the parties concerned" (naming the *unions* that were contesting for jurisdiction) should accept the decision of the Executive Council Committee "as final and binding." The decision contains the unsworn recital that "All parties agreed to accept the decision of the committee and to be bound thereby" and the word "parties," as used in the decision clearly refers to the "parties" referred to in the Directive; *i. e.,* the unions [R. 732].

All of the sworn testimony with respect to the Directive was given by B. C. DuVal, Business Agent of Local 44 of the IATSE, and Roy M. Brewer, International Representative of the IATSE. Neither Mr. DuVal nor Mr. Brewer was in Cincinnati at the time of the issuance of the Directive, and all of their testimony is based upon what Richard F. Walsh, President of the IATSE, had told them [R. 557, 682]. Such hearsay testimony does not meet the standards prescribed by the Administrative Procedures Act. In referring to the standards of evidence required by that Act, the Court of Appeals for the Sixth Circuit, in *Pittsburgh S. S. Co. v. NLRB,* 180 F. 2d 731, 733 (cert. granted, 70 S. Ct. 842), said:

> "These standards were designed to eliminate the wholesale use of hearsay, the drawing of expert inferences not based upon evidence, and the consideration of only one part or one side of the case."

When the burden of proof is upon the employer, the Board refuses to accept hearsay testimony (*Ohio Associated Telephone Co.* (Oct. 16, 1950), 91 NLRB No. 162, 26 LRRM 1599). The Board should be required to apply the same standard where the burden of proof is upon the Board.

Upon the basis of what Mr. Walsh told Mr. DuVal, the Record shows that Mr. DuVal identified Board's Exhibit No. 17 (which it was stipulated was identical with the Directive quoted in Board's Exhibit No. 8) as "the Directive that was issued by the American Federation of Labor Council in Cincinnati" [R. 557, 571, 731-32]. Upon the basis of what Mr. Walsh told him, Mr. Brewer testified that the Directive "was a Directive which was issued by the Council which was accepted by the *unions* involved" [R. 668]. Based upon what Mr. Walsh told him, Mr. Brewer testified that Mr. Eric Johnston was present in Cincinnati representing the major motion picture producers, including respondents [R. 683]. There was no testimony whatsoever, hearsay or otherwise, that Mr. Johnston or any other representative of respondents had agreed to submit the dispute to the Executive Council or had agreed to abide by any directive issued by the Executive Council.

The only testimony with respect to any understanding concerning the application to be made of the Cincinnati Directive is the hearsay testimony given by Mr. DuVal and Mr. Brewer based upon what Mr. Walsh had told them. Mr. DuVal did not testify that the *producers* had made any agreement, but he did testify that there was "an understanding" without attempting to state who the parties were to that understanding. He testified that whenever he used the word "strikers" he meant the members of the CSU [R. 560] and that "There was an understanding that those that were on strike [the CSU strikers] were to return to work on a certain date, and that those that were in there filling the jobs were to stay on the job for a period of sixty days, until this Directive could be carried out" [R. 558]. He further testified that he was told that a dispute arose as to whether the replacements hired to take the places of the CSU strikers could stay on the job [R. 558]; that Mr. Johnston and others met

with the Executive Council in Washington [R. 558]; that the Executive Council directed that both the replacements and the CSU strikers should be continued on the payroll [R. 563-564], and that Mr. Johnston and Mr. Hutcheson, who was President of the Carpenters Union, had agreed that the producers would not work the IATSE replacements alongside the CSU strikers [R. 558-560, 570]. (It should be noted that the purported agreement between Mr. Johnston and Mr. Hutcheson was not an agreement to abide by the Directive or to return the insubordinate IATSE members to work.) If this hearsay testimony can be regarded as "reliable, probative and substantial evidence" that the producers made an agreement with respect to the application of the Directive, it is not evidence that the producers agreed to return the insubordinate IATSE members to work.

Mr. Brewer testified, by way of hearsay, that he was told by Mr. Walsh [R. 682] that there was no understanding that the insubordinate IATSE members were to be reinstated to their jobs [R. 684]. He further testified that he issued instructions that such IATSE members "were not to be recognized as having any right to reinstatement on jobs which they had failed to fill when they had been requested to do so by the union" [R. 685].

If the conduct of the producers is looked to for the purpose of ascertaining what agreement was made by them with respect to the application of the Directive, the evidence is uncontradicted that respondents returned the CSU strikers to work [R. 565, 671] and that none of the insubordinate IATSE members was returned to work except three Pattern Makers at Warner Bros. (Schnell,

Horner and DeSanctis) in job vacancies which none of the other complainants was qualified to fill, and one Grip at Loew's (Selgrath) in a job vacancy which had occurred there of a lower classification than the job held by Selgrath at the time of the strike. The very issuance of Mr. Pelton's instructions, pursuant to orders of the Producers Labor Committee, that the insubordinate IATSE members should not be returned to work except with approval of their IATSE Locals, is indicative that the producers had not agreed to reinstate such IATSE members. The IATSE had furnished respondents with IATSE members to take the places of those that had refused to perform services as directed during the strike. The IATSE took the position it had furnished employees to fill the jobs of complainants when it was difficult to get men to do the work and that it would not agree to the displacement of those employees [R. 684]. There was no reason why respondents should employ two men for those jobs. Why not toss the problem into the lap of the IATSE? Mr. Pelton's memorandum makes it clear that respondents were attempting to avoid controversy with the IATSE by placing upon the IATSE the responsibility, under its closed shop agreement [R. 748-755], of determining whether the IATSE replacements or the IATSE "bolters" should perform IATSE jobs.

That the respondents had not at Cincinnati agreed to reinstate complainants is the fair and logical conclusion from the fact that the Cincinnati meeting was called, as petitioner concedes, for the purpose of settling the *CSU strike* (Pet. Br. 6); that following the Cincinnati meeting the CSU strikers were reinstated and complainants were not; and that on the very day that the CSU strikers

were reinstated, instructions were issued by Mr. Pelton that complainants, who were IATSE members, were not to be reinstated with the CSU strikers [R. 747].

The sketchy character of the proof with respect to the Cincinnati Directive and the total absence of any evidence that the producers had agreed to reinstate the insubordinate IATSE members is explainable. There is nothing in the Record to indicate that at the time of the hearing the Board had any theory that the producers had agreed to reinstate the insubordinate IATSE members, and that thereby the producers had transformed unprotected concerted activities into protected concerted activities. At the time of the hearing it was the Board's theory that the IATSE members who had refused to perform services as directed and had been discharged were actually discharged; that such discharge was an unfair labor practice; and that the IATSE members who had gone home or failed to report for work during the strike were refused reinstatement because they had engaged in concerted activities which were protected by the Act. Mr. DuVal and Mr. Brewer were interrogated with respect to the Cincinnati Directive because the Board had charged respondents with violating the Act by paying bonuses to the employees who did the strikers' work [R. 158]. By referring to the Cincinnati Directive, Mr. DuVal and Mr. Brewer explained why the IATSE replacements of the CSU strikers received sixty days' pay even though they did not work during the sixty days, and why certain other IATSE members who temporarily worked outside of IATSE jurisdiction, received $3.50 per day for each day during which they so worked [R. 158-165]. These payments were held by the Trial Examiner and

by the Board not to constitute unfair labor practices [R. 165, 24]. Under the Board's theory at the time of the hearing, the question of whether the producers had made any agreement with respect to reinstatement of the insubordinate IATSE members was not an issue, and there was therefore no occasion to call witnesses who were present in Cincinnati and who could give competent testimony as to what the producers had agreed to do with respect to the Directive which was issued by the Executive Council of the American Federation of Labor. The Trial Examiner, in his Intermediate Report, followed the Board's theory at the hearing; he did not contend that respondents had agreed to reinstate the IATSE members [R. 146-156]. The theory upon which the Board rendered its decision, appeared for the first time in its decision rendered almost three years after the filing of the complaint against respondents and almost two years after the filing of the Trial Examiner's Intermediate Report.

Respondents respectfully contend that the question of what the producers agreed to do with respect to the Cincinnati Directive is not material because, even if any agreement had been made to reinstate the insubordinate IATSE members at the same time the CSU strikers were reinstated, such agreement could not transform that which is not a concerted activity protected by the Act into a concerted activity protected by the Act. But if the Court should disagree with respondents as to the materiality of that question, nevertheless the Court is not bound by the Board's finding, which is not supported by any evidence, that there was an agreement by respondents to reinstate complainants. All of the evidence points to a conclusion contrary to that reached by the Board and this finding, we submit, and the Board's conclusion based thereon should be rejected by this Court.

2. **Even if There Were Reliable, Probative, and Substantial Evidence That Respondents Agreed to Carry Out the Provisions of the Cincinnati Directive, Such Evidence Would Not Support a Finding That Respondents Agreed to Reinstate Complainants.**

a. READ IN THE LIGHT OF THE UNCONTRADICTED EVIDENCE WITH RESPECT TO THE CIRCUMSTANCES SURROUNDING ITS ISSUANCE, THE DIRECTIVE REFERRED ONLY TO THE RETURN OF THE STRIKING CSU MEMBERS. COMPLAINANTS WERE NOT CSU MEMBERS BUT MEMBERS OF THE IATSE.

The Cincinnati Directive issued by the Executive Council of the American Federation of Labor provided "That all employees return to work immediately" [R. 731]. The words "all employees" must be read in the light of the uncontradicted evidence of the circumstances in which they were used. What was the situation? A CSU union had called a strike and established picket lines [R. 527, 586, 333]. The other CSU unions had joined in the strike. They had not only respected the picket lines; they had joined in the picketing [R. 587, 334-335]. The IATSE had furnished replacements for the members of the CSU who had gone out on strike so that in October, 1945, the IATSE was representing employees both in the job classifications formerly within the jurisdiction of the IATSE and in the job classifications formerly within the jurisdiction of the striking unions. The Executive Council of the American Federation of Labor decided to end the strike and, to accomplish that, it had to provide machinery for determining which of the two competing confederations of unions (the CSU and the IATSE) should have jurisdiction over the various types of studio work and had to provide that each of the competing confederations of unions should give up such work as was awarded to the other confederation of unions. The Cincinnati

Directive provided that these determinations were to be made by an Executive Council Committee within sixty days after the date of the Directive. The Directive contemplated that during the sixty-day period, the producers were to employ two employees for every CSU striker's job and that when jurisdiction of the strikers' jobs had been determined at the end of the sixty-day period, the employee who was a member of the union which was awarded jurisdiction of that job would be continued on, and the employee who was a member of the union that lost jurisdiction of that job would be dropped. Thus, the Directive contemplated that all CSU strikers would return.

Complainants were in a different category. They were IATSE members who had either been discharged or had gone home or had failed to report for work. Other IATSE members had been employed to perform complainants' jobs. There was no question between complainants and the IATSE members employed in their jobs as to what union had jurisdiction over those jobs. They were IATSE jobs. There was not the slightest reason for employing two men for each of those jobs for a period of sixty days. (As pointed out above, where a CSU union and an IATSE union were competing for jurisdiction over a job, there was a valid reason for employing both a CSU member and an IATSE member in that job during the sixty-day period when jurisdiction was being determined.) Nothing decided by the Executive Council of the American Federation of Labor would determine which of the two IATSE members was entitled to the IATSE job. It did not make sense to employ two IATSE members for each of these IATSE jobs. The Directive should be construed so as to make sense. By providing that "all employees" were to return to work immediately, the Executive Council was referring to those

employees who were members of the striking unions and who had gone out on strike.

The Board, by distorting the facts and ignoring the uncontradicted evidence, has concluded that complainants were "strikers" who "should be treated no differently, in view of the Cincinnati Agreement, than the other strikers" [R. 10; Pet. Br. 6]. But even the Board recognizes that it was not complainants' dispute but the CSU strike which was settled in Cincinnati (Pet Br. 6; R. 11]. The Cincinnati Directive, therefore, had reference to the CSU strikers and had nothing to do with complainants' dispute with their employers and their defection from the concerted action of their union.

The Cincinnati Directive is before the Court [R. 731-732]. The evidence (such as it is) as to the circumstances under which it was issued by the Executive Council of the American Federation of Labor is uncontradicted. The Board was in no better position to interpret this instrument than is the Court. The meaning of the Directive is not a question of fact, but is a question of law. (*Aluminum Company of America v. NLRB* (7th Cir.), 159 F. 2d 523, 525.) The Court is not bound by the Board's interpretation of this written instrument. It should interpret the instrument so that it will carry out the plain intention of the Executive Council of the American Federation of Labor which issued the Directive.

b. The Directive Referred Only to Strikers. Complainants Were Not Strikers.

Petitioner construes the words "all employees" in the Cincinnati Directive as follows:

> "* * * the term 'all employees' meant all strikers who had been 'on call' on March 12, 1945, the date of the inception of the strike * * *." (Pet. Br. 23.)

Petitioner says that the Cincinnati Directive "provided for the reinstatement of all strikers." (Pet. Br. 21, 22.)[24]

The evidence is uncontradicted that the fourteen Warner Bros. employees who were discharged and the two Columbia employees who were discharged were not strikers. They were discharged before they left the studios. They did not walk out. They were fired. Petitioner says that the discharge was not a discharge but was a "tactical maneuver." It is a mere *ipse dixit* for the Board to declare that a discharge is not a discharge just because such a declaration suits its purposes.[25] As pointed out in the Statement of the Case, the Board's complaint alleges that these employees were discharged; the hearing before the Trial Examiner was conducted on that theory; the employees understood that they had been discharged. Some of the Warner Bros. employees immediately returned to work and performed services as directed. Since the bookkeeping operation of removing their names from the payroll had not been completed at the time of their return, their discharge was simply cancelled and they were reinstated as employees [R. 637]. Those, however, who did not immediately return to work remained in the status of

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[24]It is our contention that the Cincinnati Directive applied only to the CSU strikers, but even taking the Board's construction of the Directive, it is inapplicable to complainants.

[25]In this the Board is not unlike Humpty Dumpty in the following passage from "Through the Looking-Glass and What Alice Found There":

> "'When *I* use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'
>
> "'The question is,' said Alice, 'whether you *can* make words mean so many different things.'
>
> "'The question is,' said Humpty Dumpty, 'which is to be master—that's all.'"

discharged employees [R. 634]. A few of the discharged employees were reemployed, two just prior to the end of the strike, and one just after the end of the strike, and when they were reemployed they were treated as new employees. Their discharge was not waived. To say that they were not discharged is to disregard the uncontradicted evidence. If they were discharged before they left the studios, as the evidence shows, then they were not strikers and if they were not strikers, then even under petitioner's interpretation of the Cincinnati Directive, they did not fall within the definition of the words "all employees" as used in that Directive.

With respect to the seven employees who were either told to report to their Locals or who went home or who failed to report for work, the evidence does not support the finding of the Board that they were strikers. The strike was called by Local 1421 of the Painters Union, and the members of the other CSU unions joined in the strike by ceasing work and engaging in the picketing. These seven employees adopted an entirely different course of conduct. Larson, who refused to perform work as directed and was told to "go home," testified "I wasn't striking, with the exception that I wouldn't go through the picket line" [R. 301; 297]. There is no evidence that Seward, who refused to perform services as directed and was told to "go see your Local," joined in the strike [R. 497]. There is no evidence that Selgrath, who refused to perform services as directed and was told "to report to Mr. Barrett at Local 80," joined in the strike [R. 393]. He testified, "I agreed that I would go home and stay until it was over" [R. 399]. Groth, who refused

to perform services as directed, testified that he told his employer "I just believed I would go home" [R. 383], and that he then left the studio [R. 387]. There was no evidence that he engaged in the strike. Goudie testified that on March 12, 1945, "I went to the studio, and they had a picket line across the entrance so I didn't go through" [R. 290]. There was no evidence that he engaged in the strike. Howe testified that on March 12, 1945, he appeared at the studio but did not go in [R. 449]. He said "I quit my job" [R. 462]. Coffey testified that he did not go to work on March 12, 1945, or thereafter during the strike because he was observing the picket line [R. 468]. There was no evidence that he joined in the strike. Stanley testified that he worked during the strike until the first of October, and that he stopped about that time [R. 508], and stayed out for the balance of the strike [R. 509]. There was no evidence that he became a striker.

That these seven employees did not engage in a strike is clear from the accepted definitions of the word "strike." In *Molders' Union v. Allis Chalmers Co.* (7th Cir.), 166 Fed. 45, 52, the court defined a strike as follows: "A strike is a cessation of work by employees in an effort to get for the employees more desirable terms."[26] It might be argued that these seven employees were engaged in some form of concerted activity (though the

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[26]This case was cited with approval in *Jeffery-DeWitt Insulator Co. v. NLRB* (7th Cir.), 91 F. 2d 134, 137; cert. denied 302 U. S. 731. See also *C. G. Conn, Ltd. v. NLRB* (7th Cir.), 108 F. 2d 390, 396-397; *Farmers Loan & Trust Co. v. Northern Pac. R. Co.*, 60 Fed. 803, 819; Restatement of Torts, Sec. 797.

evidence indicated that their activity was individual rather than concerted), but the evidence is clear that their purported "concerted activity" was not the activity of being "strikers."[27] The strikers were the CSU employees that joined with the members of Local 1421 of the Painters Union in their attempt to compel respondents to recognize Local 1421 as the collective bargaining agent of Set Dressers.

The evidence, therefore, does not support a finding that complainants were strikers. Consequently, even if there were evidence that respondents had agreed to abide by the Cincinnati Directive, such agreement would not have obligated respondents to reinstate complainants because, as the Board admits, the Directive applies only to strikers and complainants were not strikers. Hence, upon the Board's own interpretation of the Directive, there is no support in the record for the Board's order requiring reinstatement of complainants with back pay.

At all events, however, the Board's theory upon which its petitions for enforcement of its order depends upon a purported *agreement* made by respondents to abide by the Directive. Section 10(c) of the Act provides that the findings of the Board must be supported by "the preponderance of the testimony" and Section 7(c) of the Administrative Procedures Act prescribes that the evidence must be "reliable, probative and substantial." The Board's finding

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[27]The Supreme Court recognizes that a strike is narrower in scope than concerted activities protected by Section 7 of the Act and that an employee might be engaged in concerted activities and still not be engaged in a strike (*International Union v. Wisconsin Employment Relations Board,* 336 U. S. 245, 258).

that respondents agreed to reinstate complainants fails not only because it is not supported by a *preponderance* of reliable, probative and substantial evidence. It fails because there is a complete *absence* of evidence which meets the standards prescribed by the Administrative Procedures Act that respondents agreed to reinstate complainants.

Conclusion.

Since the activities which complainants engaged in were not concerted activities protected by Section 7 of the Act, petitioner is not entitled to a judgment enforcing its order for reinstatement of complainants with back pay. Petitioner does not contend that complainants' activities were protected concerted activities, but contends that it is immaterial whether or not complainants' activities were protected by the Act. Petitioner is in error in this contention. Petitioner's power is limited to remedying violations of the Act, and if complainants' activities were not protected by the Act, then respondents did not violate the Act by refusing complainants reinstatement because of such activities.

But petitioner advances the anomalous theory that respondents agreed to reinstate complainants and that thereby respondents "waived" or "condoned" complainants' activities. Petitioner does not cite any case which *holds* that such a novel theory is tenable. Even if there were evidence to support such an anomalous theory, petitioner would not be entitled to judgment. An unprotected activity cannot, by agreement, be transformed into a protected activity.

Petitioner's anomalous theory is actually without support in the evidence. Petitioner meets two hurdles which are insuperable: (1) There is no substantial evidence of the quality required by the Administrative Procedures Act which establishes that the settlement of the *CSU strike*

resulted in an agreement to reinstate complainants whose dispute with their own union and with their employers was not settled at Cincinnati. The only testimony that could possibly be construed as evidence of any agreement by respondents with respect to the reinstatement of employees was hearsay testimony that respondents undertook to reinstate, not complainants, but the CSU strikers, and competent testimony that following the Cincinnati settlement respondents reinstated, not complainants, but the CSU strikers. (2) There is no substantial evidence of the required quality that complainants were strikers within the meaning of the Cincinnati Directive which petitioner interprets as requiring the reinstatement of all strikers who had been "on call" on March 12, 1945. The uncontradicted evidence is that sixteen of complainants were discharged and that the other seven complainants were engaged in activities which, whether of an individual or of a concerted character, were certainly not activities which constituted those complainants strikers.

The National Labor Relations Board is a statutory body of limited power. Its authority is limited to remedying violations of the National Labor Relations Act, and its orders must be based upon reliable, probative and substantial evidence. Under the law applicable to this proceeding, the Board is not entitled to enforcement of its order.

Respectfully submitted,

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